IN THE

Supreme Court of the United States

October Term, 1940

No.

MONTGOMERY WARD & CO., INCORPORATED,
Petitioner,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case

Only one point made in the statement in the petition of the matter involved (which statement is adopted as a part of this brief) requires further amplification.

The opinion of the Circuit Court of Appeals speaks at great length (R. 250-252) of the various duties and functions imposed upon the Administrator by the Act, including:

a. The duty to recommend further legislation concerning wages and hours to Congress (Sec. 4).
b. The duty to appoint an industry committee to investigate an industry and to establish maximum hour and minimum wage standards for it (Sections 5 and 8).
c. The power to investigate an industry to gather data concerning it (Section 11(a), first clause).
d. The duty to define and delimit by regulation various exemptions from the provisions of the Act (Section 13) and various special applications of it (Section 14).

None of these duties and powers were the basis for the subpoena *duces tecum* issued against this petitioner. This subpoena was issued simply in connection with the Administrator's power to police the Act—a power defined by the second clause of Section 11(a) of the Act —the power to

> "* * * enter and inspect such places and such records * * * and investigate such facts * * * as he may deem necessary or appropriate to determine whether *any person* has violated any provision of this act, or which may aid in the enforcement of the provisions of this act." (Italics added)

This is the statutory power invoked by the Administrator in his application to the District Court (R. 3), where he professed that he wished to investigate these records because he believed the petitioner was violating the Act (R. 4 and 5). He nowhere alleged that his demand is made in connection with an investigation of an industry, or even that he suspected others of violating the Act and was making a general check-up.

The language of the opinion confuses the various functions of the Administrator, and often speaks of the investigation involved as an investigation of an "industry".

The real issues in the present case are obscured unless it be clearly understood that the question is simply as to the extent to which a law enforcement or policing agency, comparable in function to the Federal Bureau of Investigation or a local police officer, has been or may be given the power to compel scrutiny of the private records of a business in the absence of a showing of probable cause to suspect a violation of law.

If the Administrator can be given such a power, any law enforcement officer can be given it.

The Administrator in seeking to inspect petitioner's records, was performing the same functions as the King's messengers whose use of writs of assistance furnished the background for the adoption of the Fourth Amendment. The subpoena *duces tecum* was not issued in aid of any of those newer administrative functions, quasi-legislative and quasi-judicial in character, which have developed out of present-day needs for expert application of general rules to special and complex situations of fact. Whether a different set of facts would require the same or a different answer, need not and should not be considered here.

No case cited by the opinion of the Circuit Court of Appeals upholds the exercise of such a power of compulsory inspection in aid of law enforcement activities alone. In this lies the novelty and importance of the decision.

Summary of Argument.

A. The decision of the Circuit Court of Appeals interprets Section 9 of the Federal Trade Commission Act in a manner in conflict with the prior interpretations of this section by this court and other courts, and in conflict with rules of construction recognized by this court and other courts.

B. The decision of the Circuit Court of Appeals in holding that a law enforcement officer charged with the duty of policing an act may constitutionally be given the power to compel the production of private papers for routine scrutiny directly conflicts with the literal prohibitions of the Fourth Amendment and with the reasoning of prior decisions of this court.

C. The decision of the Circuit Court of Appeals conflicts with the prior decision of this court in *Fed. Tr. Com.* v. *American Tobacco Co.*, in holding that the same principles may apply to the records of all businesses in interstate commerce as apply to the inspection of the books and records of common carriers by the Interstate Commerce Commission.

D. The decision of the Circuit Court of Appeals, in holding that records may be subjected to a subpoena *duces tecum* without a prior determination whether they are covered by the regulatory statute, conflicts with prior decisions of this and other courts.

ARGUMENT.

POINT A

The decision interprets Section 9 of the Federal Trade Commission Act in a manner in conflict with the prior interpretation of this section by this Court and other Courts.

The power of the Administrator to issue a subpoena *duces tecum* derives solely from Section 9 of the Federal Trade Commission Act (R. 3), and from no other statutory provision. That section permits the Administrator "access to * * * documentary evidence" either by requesting a district court to enforce a subpoena *duces tecum*, or by asking the Attorney General to petition a district court for a mandamus. The use of a subpoena *duces tecum* or the alternative remedy of mandamus under this section is limited by the word "evidence". Not all papers may be subpoenaed; only papers which are "evidence" are subject to the writ.

This Court has already passed directly on the meaning of this precise limitation. In *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, the remedy of mandamus was requested. The opinion was specific:

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it." (At p. 306 of 264 U. S.)

In the present case, the Circuit Court of Appeals has given the Administrator access to all the documents in order to see if they contain evidence without requiring

him to show grounds for supposing that the documents contain it. The Circuit Court of Appeals, in direct defiance of the holding in the *American Tobacco Co.* case (to which it does not advert at all in that portion of its opinion which deals with the intent of Congress) held:

> "We are of the opinion that the terms of the Act necessarily indicate a legislative intent that the exercise of the investigatory powers of the Administrator be in no degree conditioned upon the existence of reasonable cause for the Administrator to believe that the industry (*sic*), which is the subject of investigation, is violating the Act." (R. p. 252)

This holding is, we submit, in direct conflict with the prior interpretation by this Court of Section 9 of the Federal Trade Commission Act.

Similarly, the holding conflicts with other decisions under the same statutory provision requiring the establishment through judicial hearing of grounds for the issuance of a subpoena *duces tecum*:

Fed. Tr. Com. v. *Baltimore Grain Co.* (D.C., Md.), 284 Fed. 886, 889, affirmed by memorandum, 267 U. S. 586;

Fed Tr. Com. v. *Smith* (D.C., S.D., N.Y.), 34 Fed. (2d) 323, at pp. 324 and 325;

or of grounds for the employment of the alternative remedy of mandamus:

Fed. Tr. Com. v. *Claire Furnace Co.*, 274 U. S. 160 at p. 174;

Fed. Tr. Com. v. *Maynard Coal Co.* (C. of A., D. of C.), 22 Fed. (2d) 873 at p. 875.

The decision of this Court in the *American Tobacco Company* case interpreting Section 9 of the Federal Trade Commission Act antedates the enactment of the Fair Labor Standards Act of 1938 which made the provisions

of Section 9 applicable to the "jurisdiction, powers and duties" of the Administrator. The decision of the Circuit Court of Appeals thus conflicts with the usual canon of construction which assumes that Congress, in reenacting a statute, adopts the judicial construction previously given it.

The decision of the Circuit Court of Appeals also offends against another rule of construction adopted by the Courts: Whenever a statute is passed authorizing the issuance of process to compel the production of private records, the Courts will read into such statute the requirement that reasonable cause be shown, even though the statute omits to include such a requirement in those it enumerates. Such was the decision in *Schencks* v. *U. S.* (C. of A., D. of C.), 2 Fed. (2d) 185, at p. 187; *Wagner* v. *U. S.* (8th Cir.), 8 Fed. (2d) 581 at p. 585; and *Woods* v. *U. S.* (4th Cir.), 279 Fed. 706 at p. 710.

Another passage from the *American Tobacco* decision is applicable here:

> "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."
>
> *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298 at p. 307.

The opinion of the Circuit Court of Appeals admits the importance of the question in this case to the administration of the Fair Labor Standards Act. The record discloses the serious burden which would be imposed upon employers by the interpretation given the laws by the Circuit Court of Appeals. Because of the wide incidence of the Act, the opinion of the Circuit Court of Appeals raises a very serious question of Federal law in apparent conflict with previous decisions of this Court and other Courts.

POINT B

The decision of the Circuit Court of Appeals in holding that a law enforcement officer charged with the duty of policing an act may constitutionally be given the power to compel the production of private papers for routine scrutiny directly conflicts with the literal prohibitions of the Fourth Amendment and with the reasoning of prior decisions of this Court.

The Fourth Amendment contains both a general guarantee:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated"

and a specific application of the general guarantee:

> "and no warrants shall issue but upon probable cause . * * * "

The two portions of the Amendment—the general and the specific—mutually assist in the interpretation of its intent. These general considerations have these corollaries:

(1) The Courts have considered subpoenas *duces tecum* to be the equivalent of search warrants. Subpoenas *duces tecum* therefore fall within the specific constitutional requirement that probable cause be shown.

A subpoena *duces tecum* when used by a law enforcement officer, as distinct from a grand jury or court, is functionally identical with a search warrant.

In the opinion of the District Court, affirmed by this Court in *Fed. Tr. Com.* v. *American Tobacco Co.,* 264 U. S. 298, occurs a passage specifically applying to a request for mandamus under Section 9 of the Federal Trade Com-

mission Act the same tests as applied to "other warrants of law, such as a subpoena *duces tecum*".

sub nom. *Fed. Tr. Com.* v. *P. Lorillard Co.*, 283 Fed. 999, at p. 1006.

Certainly those who proposed our Bill of Rights, conscious as they were of the dangers to which they had been exposed under the obnoxious writs of assistance, did not intend by the use of the term "warrant" to limit the requirement of probable cause to writs technically so entitled, and to permit the evasion of the Fourth Amendment by a trick of nomenclature.

We submit, therefore, that the decision of the Circuit Court of Appeals is directly opposed to the obvious intent of that portion of the Fourth Amendment which requires a showing of probable cause before warrants may issue.

(2) The Courts have held that the requirement of probable cause is included within the concept of reasonableness in the general guarantee of the Fourth Amendment so as to require a showing as to probable cause in order to justify searches and seizures in the absence of warrants.

If for some reason a subpoena *duces tecum* be not considered a "warrant" within the specific provisions of the Fourth Amendment, nevertheless the essence of the requirement of probable cause is retained by the general prohibition of "unreasonable" searches and seizures.

This is the necessary logic of those decisions which hold that arrests or seizures of the person without a warrant are improper under the Fourth Amendment unless probable cause be shown:

Garske v. *U. S.* (8th Cir.), 1 Fed. (2d) 621, and cases there cited.

This is equally the necessary logic of those cases which hold as did *U. S.* v. *Lefkowitz,* 285 U. S. 452, that:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained." (285 U. S. at p. 464)

A subpoena *duces tecum* should not be given a greater scope, in the hands of a law enforcement officer, than a search warrant issued after judicial examination into the existence of probable cause. Yet even a search warrant, so issued,

> "* * * may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. * * *"
>
> *Gouled* v. *U. S.,* 255 U. S. 298, at p. 309.

The distinction is between probable cause to suspect that a certain record is an instrumentality of crime, and mere probable cause to believe that a search through papers will disclose some evidence. The concept of a hunt *through papers* as distinct from a search on premises for *a specific paper* has thus always been held within the prohibitions which the Fourth Amendment places upon the activities of policing officials.

We submit that the decision of the Circuit Court of Appeals that the Administrator, functioning as a law-enforcing officer, is under no such constitutional limitations as other police officers is directly opposed to the reasoning of this and other Courts in the cases cited above.

(3) In holding that a law enforcement officer or agency may be given the right to make routine searches of private papers, the decision of the Circuit Court of Appeals is in conflict with the reasoning of this Court in *Fed. Tr. Com.* v. *American Tobacco Co.*

In *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, the Commission (which had many functions) sought in its capacity as a law enforcement agency to discover whether the records of two businesses contained evidence of "the possible existence of practices in violation of Section 5" of the Federal Trade Commission Act (264 U. S. at p. 305). The claim made by the Federal Trade Commission was strikingly similar to that of the Administrator, and was characterized by this Court as a claim of "an unlimited right of access to the respondents' papers" (264 U. S. at p. 305)—that is, to all papers that might contain evidence of such a violation of law unlimited by the necessity of showing pre-existing grounds for supposing them to contain such evidence. Before turning to the question of statutory interpretation, this Court said of the implications of such a claim in the light of the Fourth Amendment:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions in the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." (264 U. S. at pp. 305 and 306)

The decision of the Circuit Court of Appeals would permit "fishing expeditions" in the exact sense of the phrase thus employed by this Court: searches through private papers without more than a possibility that evidence of an offense will be uncovered.

POINT C

The decision of the Circuit Court of Appeals conflicts with the prior decision of this Court in *Fed. Tr. Com.* v. *American Tobacco Co.*, in holding that the same principles may apply to the records of all businesses in interstate commerce as apply to the inspection of the books and records of common carriers by the Interstate Commerce Commission.

This Court said, in the *American Tobacco* case:

> "The mere fact of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be." (264 U. S. at p. 305)

Despite this flat statement, the Circuit Court of Appeals said:

> "* * * When Congress, in the exercise of its power under the commerce clause, has created an administrative agency with power to regulate and supervise the conduct of an industry and has authorized such administrative agency to inspect books and records for the purpose of enabling the agency to perform its functions under the Act, the same principles that have been applied to inspection of books and records by the Interstate Commerce Commission are applicable to inspections by such other administrative agency." (R. 254)

This passage illustrates again the failure of the Circuit Court of Appeals to distinguish between demands for information in aid of a rule-making or regulatory power and demands for information in aid of law enforcement. Demands for information in aid of a quasi-legislative function may raise problems under the Fourth Amendment, but we are not confronted with those problems in this case.

A great danger lies in the repudiation by the Circuit Court of Appeals of the passage quoted from the *American Tobacco* case.

The theory has been advanced that the records of certain businesses which are public agencies belong to the public and not to the businesses, and hence are "public records" and not "private papers" within the protection of the Fourth Amendment:

> "If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.'"
>
> (*Smith* v. *Interstate Commerce Commission*, 245 U. S. 33 at p. 43)

The passage of the *American Tobacco* decision just quoted was written in answer to an effort to extend this theory, as is demonstrated by its citation of the *Smith* case; and consequently repudiates any extension of the theory to the records of a non-public business.

The Circuit Court of Appeals argues that any business which, in its activities, substantially affects interstate commerce is consequently so "affected with a public interest" as to justify federal regulation (R. 256). The Circuit Court of Appeals thus dangerously confuses the concept of "affected with a public interest" sufficient to justify regulation, with the concept of a business operated as a public agency, whose records consequently belong to the public.

Records are either "private papers" protected by the Fourth Amendment or "public records" which are not.

The problem here is one of kind and not of degree. If the Circuit Court be correct, the protection of the Fourth Amendment is removed from all records of all individuals and corporations conducting businesses which affect interstate commerce. Such a rule would practically nullify one of the most important safeguards established by the Bill of Rights.

The reasoning of the Circuit Court of Appeals is thus in direct conflict, not only with the statement of this Court already quoted from the *American Tobacco* decision, but also with the references in that case to the records demanded as "private papers" (264 U. S. at p. 306).

POINT D

The decision of the Circuit Court of Appeals, in holding that records may be subjected to a subpoena *duces tecum* without a prior determination whether they are covered by the regulatory statute, conflicts with prior decisions of this and other Courts.

The Circuit Court of Appeals brushes aside, in the last two paragraphs of its opinion (R. 260-261) a problem of considerable importance, both from the standpoint of statutory interpretation and from the standpoint of constitutional theory. The opinion says:

> "Respondent insists that the subpoena was unreasonable because the records required would include records of employees not entitled to the benefits of the Act." (R. 260)

The opinion does not point out that these employees fall into two classes:

1. employees not engaged in interstate commerce and hence outside the scope of the Act,
2. employees whose work falls within specific statutory exemptions. (R. 48)

The opinion seems to overlook the first class entirely, for it reasons, first, that the Administrator "must determine for himself, in the first instance, whether an employee * * * is one entitled to the Act's benefits" (R. 261) and, second, that:

> "To make proper and effective regulations the Administrator is entitled to full information respecting the character and basis of voluntary classification by the employer." (R. 261)

The second reason involves the erroneous assumption that the Administrator was here seeking information in aid of his rule-making powers, whereas he made no such claim in his application to the District Court (R. 2-9). The first reason, by assuming that the Administrator, as a law-enforcement officer, is entitled to compel the production of papers to determine whether they are relevant to the enforcement of the Act, conflicts both with this Court's interpretation of Section 9 of the Federal Trade Commission Act, and with the interpretation of the Fourth Amendment which the opinion of the Circuit Court of Appeals itself adopts.

Construing Section 9, this Court said in *Fed Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298:

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection."
>
> (Here the *American Tobacco* case exactly parallels the present case, as is shown by petitioner's answer in the District Court, at 48 of the Record.)
>
> "We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to

> produce such papers as they conceived to be relevant to the matter in hand. If their judgment upon that matter was not final, *at least some evidence must be offered to show that it was wrong.*" 264 U. S. at p. 307—italics added.

Fed. Tr. Com. v. *Claire Furnace Co.*, 274 U. S. 160, also involved the same issue of a mixed demand for information "revealing the intimate details of every department of the business, both intrastate and interstate" (274 U. S. at p. 167). This Court denied an injunction on the ground that upon the hearing for mandamus

> "* * * the defendant therein would have been fully heard, and could have effectively presented every ground of objection sought to be presented now." (274 U. S. at p. 174)

The same rule was announced as to the alternative remedy of subpoena *duces tecum* in *Fed. Trade Com.* v. *Smith* (D. C., S. D., N. Y.), 34 Fed. (2d) 323, at p. 325.

As the opinion of the Circuit Court of Appeals admits:

> "* * * the Government may not demand unlimited access to all the corporation records, whether relevant or irrelevant to the subject of inquiry or investigation." (R. 258)

We submit that records pertaining to employees not covered by the Act are clearly irrelevant to any inquiry whether the petitioner has violated the Act, and hence are, upon constitutional principle and the precedents, not subject to search by subpoena *duces tecum*. We submit that the decision of the Circuit Court of Appeals on this point is obviously and directly in conflict with the prior decisions of this Court.

Respectfully submitted,

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Counsel for Petitioner.